

**SEDGWICK COUNTY
BOARD OF ZONING APPEALS
MINUTES
July 11, 2000**

The regular meeting of the Sedgwick County Board of Zoning Appeals was held at 3:30 p.m. on July 11, 2000, 3rd Floor, Sedgwick County Courthouse, 525 N. Main, Wichita, Kansas.

The following members were in attendance: Chairman, GARY WILEY, and DENNIS GRUENBACHER, and GRANT TIDEMANN were present. JANA MULLEN and KATHLEEN GIDEON were absent.

The following Planning Department staff members were in attendance: Secretary, DALE MILLER and Assistant Secretary, LISA VAN DE WATER, present. Recording Secretary, ROSE SIMMERING absent.

Triplett, Woolf, Garretson, 2959 N. Rock Road, Suite 300, Wichita, KS 67226 c/o Rachel Pirner is representing the County Board of Zoning Appeals.

Glen Wiltse, Director, Sedgwick County Code Enforcement, represented by Pat Hughs, Adams and Jones, 155 N. Market, Wichita, KS 67201-1634.

WILEY: Call meeting to order. First order of business to approve the closing dates for the year 2000. Did you all get a copy of that? Did you see any problems with any of that, if not I would entertain a motion for approval.

TIDEMAN moves GRUENBACHER seconds the approval of the closing dates for the year 2000.

MOTION CARRIES 3-0.

WILEY: Item 2 is the approval of the meeting minutes for the following meeting: June 7, 1999. Did everybody look through and have any problems with those?

TIDEMAN: I don't remember that far back.

WILEY: I don't either.

GRUENBACHER: I wasn't on the Board at that time.

WILEY moves TIDEMAN seconds to approve the June 7, 1999 meeting minutes.

MOTION CARRIES 2-0.

WILEY: The August 2, 1999 meeting minutes, Dennis again wasn't here.

TIDEMAN moves WILEY seconds to approve the August 2, 1999 meeting minutes.

MOTION CARRIES 2-0.

WILEY: The November 1, 1999 meeting minutes, and Dennis was here for that.

TIDEMAN: I was not here for that meeting.

GRUENBACHER moves WILEY seconds to approve the November 1, 1999 meeting minutes.

MOTION CARRIES 2-0.

WILEY: Now we will take a short recess while we wait on Glen's attorney.

VANDEWATER: Rachael Pirner, she is representing the Board.

WILEY: Is she also representing Glen?

VANDEWATER: No, Pat Hughs will be representing Glen.

WILEY: Case No. BZA-2000-00015.

MILLER: In the interest of time, just to advise you the applicant has to be out of here by 5:00 p.m. and so we may end up, if it goes longer than that, having to continue it to a later date. But, in the interest of being brief, on page 2 of your packet is a report, the background as to why we are here, basically the applicant owns some property that he is interested in doing a recycling processing activities on.

It is the site of an old landfill and previously approved transfer station and as part of continuing his operations there for the transfer station and for an old C and D landfill, construction and demolition landfill, he is wishing to expand his composting activities.

So one of the things that he wanted to investigate was whether or not composting would be considered to be an agricultural use which would then make it exempt from the zoning code which says that it requires zoning in order to conduct that particular activity. As you know, in the zoning code, anything that is an agricultural use is exempt from regulations by the code. So, he is here basically seeking an appeal of the Zoning Administrator's Interpretation, which was also provided to you in the packet, it is a letter dated May 5, 2000, where he reviewed his activities and gave him an answer on whether or not he thought it was an agricultural use. In his opinion, at that time, it was not an agricultural use. So the applicant is appealing that ruling to you all and so it is your responsibility to listen to the applicant and the representatives for

the County Code Enforcement, and then make a decision as to whether or not it is an agricultural use.

WILEY: So, the way that I understand this though is in fact it was an expanded Conditional Use submitted for this operation at one time?

MILLER: I do not know that technically it is an expanded use. There has been composting going on, on the location and at the time that the applicant determined to try and get the transfer station added as a use to the C and D landfill that the composting became apparent that he needed additional zoning for composting activities on that location.

WILEY: Additional land as well?

MILLER: Yes, the site is larger than what the original C and D landfill was on.

WILEY: That is the reason it came from the County Commission back? Or was it going back to Derby.

MILLER: Well actually, that really doesn't have anything to do with this particular request. It is just that in the course of getting those applications heard it became apparent that zoning was necessary for him to do the composting, recycling processing center and so those are really separate issues from this.

GRUENBACHER: Is the whole area zoned agriculture?

MILLER: No.

GRUENBACHER: Where he has his landfill it is commercial or what?

MILLER: It is General Industrial, where the C and D landfill is.

GRUENBACHER: Where he wants to move the composting what is that zoned?

MILLER: It is zoned "RR" Rural Residential today and would require "LI" Limited Industrial zoning.

WILEY: And that is an area south and to the west of the C and D?

MILLER: Yes, mostly west.

WILEY: Mostly west over towards the river. Anybody else have any questions? Do we want to hear from Glen first or the applicant here first?

PIRNER: Usually on an appeal you will hear from the applicant first.

WILEY: Okay, Mr. Mills.

Sanborn and Mills, Chartered, %RUSSELL MILLS, 343 N. Market, Suite 200. Wichita, KS 67202-2009, Attorney, representing the applicant which is Derby Recycling and Transfer Stations LLC: If I might, I would like to kind of give our version of some of what Dale has just told you. This is a land use issue. A land use issue regarding the area where we have been composting on since 1996 we have been composting on this location. We did that and obtained a permit, we obtained approval from the County and State to do that and we have been doing that with no problems at all, until we sought an application on other parts of our ground for a transfer station. When that application was filed, then people got all shook up I guess and decided that they wanted to look at our entire operations. We were always under the belief number-one, that this was an agricultural use, however, we went along to get along and got the composting permit to begin with. Again we operated from 1996 even to the present day.

Then evidently a new Zoning Director came into office and determined that our use was not proper in the "RR" zone. Again, we tried to go along to get along, and we filed an application for the change of the zone to "LI" because at least the Zoning Director or the Code Enforcement person believed that we needed to have a "LI" zone. Rather than the fact that we believe that it is an agricultural use and that we don't need any zoning. So, that is what has brought us up to here. We had a hearing in front of the Derby Planning Commission that initially voted 9-0 in favor of our application to change the zoning to "LI", which again we dispute that we need. Then, it went to the County Commission, and the County Commission had some concern over some of the language of the report that was sent to them from the Derby Planning Commission. Then it was sent back to the Derby Planning Commission and they then, basically, we believe with no new evidence, reversed their decision. Based upon that, we decided, meaning the applicant decided, that we need to get this issue as whether this is an agricultural use of the land decided before we go further in that process.

So, having said that, that is what has brought us here today. I am sure you all received a copy of the report that Dale provided, he provided me a copy, and I would like to just briefly, just hit on a few points that are set out therein and probably the most important thing that needs to be pointed out. If we remember nothing else, is the fact that composting is not mentioned anywhere in the Zoning Code. You will not find it, I brought it with me today, if you care to go through it page by page, you will not find the word compost or composting anywhere in the Code.

That is important, and that is important because of what the Kansas Supreme Court has told us. I set out for you in my report on page 4 exactly what the Kansas Supreme Court has said in instances where there are exceptions in the Code or the regulations. The Kansas Supreme Court advises in a case called Miami County v

Svaboda that zoning ordinances, and zoning regulations are the same as ordinances. One is for the City and one is for a County, are in derogation of the right of a private property owner and should be literally construed in the property owners favor where exceptions appear in such regulations. And they are to be construed liberally in favor of the property owners.

Well obviously if composting isn't mentioned anywhere, that is an exception. So, you must then follow the lead of the Kansas Supreme Court and you have to then look at the zoning code and construe that zoning code liberally in favor of the property owners. Because, if it is not clearly set out in the zoning code, then, a misinterpretation can be had and derogation of the rights of a property owner which you can't do according to the Kansas Supreme Court so that we believe is the most important aspect of our appeal. Now, there is some argument that is being made by Code Enforcement that well this falls within a Recycling and Processing Center, but, folks look at the definition of Recycling and Processing Center. Nowhere in that definition is a composting facility mentioned. You can't write into law something that doesn't exist in the law. We don't have that right and I don't and you don't. So we have to deal with what exists within the code today.

Now, counsel for Code Enforcement may argue and will argue that this is a Recycling Processing Center. Well, show me where it says in the zoning code a composting facility is a Recycling and Processing Center, you can't do it. Now another thing he will try and argue is that we are recycling, these are recyclable materials. Here again look at the definition of recyclable materials in the zoning code. Nowhere in that definition is the word tree, brush, grass, limb, or anything like that mentioned in the zoning code. Again, you can't write into the zoning code something that is not there. You have to deal with what exists. Counsel will again attempt to say, well, no, this is what that means. Well, he no more has the right to re-write the zoning code than I do.

Now, another thing that is of interest, at least to us, and really has not been addressed, at least by the report that I have received, just today, by the attorney for the Code Enforcement is that Agricultural products are defined for us by Statute. They are defined in K.S.A. 2-2301, and it says that "Agricultural products" shall mean and include products and foods in raw or processed form which are obtained in whole or in part from plants. Now, there is absolutely no way to get around the fact that compost is derived from plants. So, it has to be, it has to be an agricultural product. One thing that counsel does point out, and I am glad that he did and he is absolutely right, the Zoning Code does not describe nor does that Kansas Statute define what the term agricultural purposes are.

Well, if that is the case, then once again, you have to follow the rule as set out by the Supreme Court and you have to liberally construe in favor this exception. Again, you don't have the right to make up what an agricultural purpose means. So, we have an agricultural product that is being produced, at our location. Another point that really

needs to be made is that this agricultural product called compost can only be used in agriculture horticulture, or as soil amendments. There is no other use for compost. I would ask that somebody tell me what use compost is used for that is not agricultural, or horticulture or for soil amendments, it is the only purpose of that agricultural product. I may be beating the dead horse, when I say clearly, clearly, compost is an agriculture product or if it is an agricultural product, the making of that or that producing of that product, has to be an agricultural process. The use of the ground has to be an agricultural process.

I provided to you, in my handout, a report from Kansas State University and Mr. William Eberle an Extension Specialist in land resources. It essentially, we believe, sets out that our use as we are using our land today is an agricultural use. And he says that in the sense that composting produces beneficial agricultural product input, it is an agricultural activity. You won't find any report from County Code Enforcement, from Kansas State University, or any place else for that matter that says that composting is not an agricultural use.

I have also provided to you a portion of a book called "On-Farm Composting Handbook." On the very cover of that it shows exactly what we do. We have windrows, we have a tractor pulling a compost turner, it is exactly our process. There is no difference in this composting and the composting that we do on our ground. Now the cases in Kansas somewhat deal with the issue of agriculture; they give us some understanding of at least what the Kansas Supreme Court says the law is.

I would like to point out in page 5 of my report, the decision of Corbet v. The Board of Shawnee County Commissioners and in that decision, the Kansas Court of Appeals talked about the legislative policy of the State of Kansas is to favor agricultural uses.

We are contending that composting is an agricultural use. So if we are going to do what the Court of Appeals in this instance says, we have to favor the policy favoring agricultural uses and promoting the development the farm industry, together with the level of construction given zoning ordinances in favor of property owners. You have got to look at both of those things. In that case, they are looking at a wildlife hunting preserve and they found a wildlife hunting preserve to be an agricultural purpose. I would submit to you that if a wildlife hunting preserve is an agricultural purpose, in the eyes of the law, then surely the use of land to develop an agricultural product, which is used as a soil amendment, which is used in agriculture, has to be an agricultural purpose as well.

I thought it curious in reviewing the report that was, again provided to me today by Mr. Hughs, that he cites absolutely no case law that I didn't cite. He cites no case law in Kansas that says composting is not an agricultural use. The reason he doesn't is because it doesn't exist. I, on the other hand, did cite a case, the only case that I could find that specifically address the issue of whether composting is an agricultural use and I included that in my paperwork that I provided to you. That was the Pennsylvania case of Gaspari v. the Board of Adjustment of the Township of

Muhlenberg, and in that case, they specifically find that the production of synthetic compost "is an agricultural enterprise". It doesn't get any plainer than that.

And again, if there was some decision out there that said that composting was not an agricultural use, or some statute out there that said composting was not an agricultural use, counsel, surely would have brought it up, or Code Enforcement would have brought it up. But, they didn't because there isn't any. The only thing that is out there is supportive of our use in the law as using this property for the agricultural purpose that we are using it for. I don't really want to go over and over the statutes but, one thing that I do think needs to be pointed out is that "farmland" the idea of "farmland" doesn't specially just mean some guy who is out there on a farm and he is planting something. I drove by a hayfield the other day and I thought about the hay that had been cut, and it was laying there on the ground, and it was in rows. I thought well, this hay is really no different than our composite, it is laying on the ground, it has to be processed and ultimately used. It is not always just used on site. It is also used off-site. So there is a lot of similarities there. The statute KS 12-758 says that when you find an agricultural use it is exempt from zoning and we contend that it is exempt from zoning, composting is exempt from zoning.

I would ask this body and counsel to address some of the points that I have brought up and explain for the record why we can amend the zoning code and find something to exist that doesn't. If that is the case then my comments here are really not relevant to this issue. If you want, I can go through agriculture processing for instance. That term is defined in the Zoning Code. Within it says that agricultural processing, that one of the typically uses of agricultural processing is a sawmill. Well, how many forest do we have in Sedgwick County? Any lumber that would be brought to a sawmill would have to be brought from someplace else. It is just that simple. We don't have forests in Sedgwick County, but, that use is suppose to be an agricultural use. Our position is if a tree is an agricultural product, whether it be a Christmas tree or any other type of tree that is developed into lumber, than obviously our use for composting, which deals with other parts of the tree rather than the body, has to be an agricultural use in process as well.

I would simply ask you to follow the law as the Kansas Supreme Court has set it out and to follow the law as I provided it to you in Court decision and Statutes and hold the County Code Enforcement's feet to the fire. Protect the rights of the property owner, that is what you are suppose to do, I hope that you will do that. If there are any questions that you have specifically of me, I would be more than willing to answer them at this time.

WILEY: Any questions?

TIDEMANN: Are the materials off the property?

WILEY: Off-site to the property. I had a couple of questions too. I know you had

a grinder. Is that located on site?

MILLS: Yes.

WILEY: You are doing construction demolition as well?

MILLS: Not on that site. See we have on other property that we own, a sandy landfill. We don't have it on this property. We are talking about this property today this 56 acres.

WILEY: I just wanted to clarify that you are not doing any of the grinding at this location.

MILLS: Just the tree brush, grass.

WILEY: I have a question for Dale also. You know Mr. Mills did indicate that there is nowhere in the Zoning Ordinance that refers to composting. I did not look but can you tell me?

MILLER: Well, he is correct in that, but the term, the definition, "recyclable materials", says, "material including, but not limited to metal, glass, plastic and paper which is intended for reuse, remanufacture or reconstitution for the purpose of using the altered form". And then goes on to say what it doesn't include, hazardous materials, industrial scrape, used clothing, furniture, appliances, vehicles or parts thereof that kind of thing. But, to me the key thing recyclable material means, material which is intended for reuse, remanufacture or reconstitution for the purpose of using the altered form.

MILLS: Can I respond to that?

WILEY: Is there anything else in there?

MILLER: Well, the other clarification that I would point out is agricultural processing, as defined in the code, means initial processing of agricultural product that is reasonably required to take place in close proximity to the site where they are produced. That is our definition.

WILEY: Mr. Mills, you wanted to add something?

MILLS: To address the last issue that he brought up. Our agricultural product is produced on site. It has to be produced on site that is where the grinder is, that is where the compost turner is, that is where we row that stuff up in a field. We cultivate it there by turning it and it is ultimately produced into an end product, no different than when you harvest wheat. So, we believe that it meets all of those criteria. As far as the definition of recyclable material, you didn't hear the word

“grass”, you didn’t hear the word “wood”, you didn’t hear the word “trees”, “limbs”, none of that. But, what Dale may be asking you to do, and I don’t know if Dale is asking you that but, he is asking you to interpret this to include something that is not specifically included therein and that you don’t have a right to do.

WILEY: Wasn’t there something to the effect to “not limited to”?

MILLER: Right, “material including but not limited to”.

MILLS: I understand that, but...

WILEY: I know that through my experience in zoning, you can’t cover everything. The material though, is not produced on site, it is brought to the site and then compost is produced.

MILLS: The compost is produced on site.

WILEY: But, not the material to make the compost.

MILLS: Well, you are not going to produce compost unless you mix the leaves, the grass and then grind it up.

WILEY: I mean that material is brought to the site and then ground together and composted. Any other questions?

Adams and Jones, Pat Hughs, 155 N. Market, 600 Market Center, P. O. Box 1034, Wichita, KS 67201-1034, I am representing Glen Wiltse: I have a few questions if I may to clarify the record before I begin. Mr. Mills, it is your position...

MILLS: I don’t know what the procedure is here, but, is Mr. Wiltse present?

WILEY: He is present.

MILLS: I wasn’t afforded any opportunity to question him. It seems to me that I ought to be given the opportunity to question him if he is going to question me.

HUGHS: I have no objection to answering questions when I am done presenting Mr. Wiltse’s position on the matter.

PIRNER: Do you have witnesses other than Mr. Wiltse?

HUGHS: I will be making a presentation because it is a legal question, we are not presenting any witnesses.

PIRNER: Okay.

WILEY: There are some other folks here that we want to be sure that they will be heard also.

MILLS: My point is Sir, is, if I am going to be asked questions to respond to by Counsel, than I should be given the same opportunity to ask questions of his client as he is to ask questions of me.

WILEY: I think that is fair, don't you agree?

PIRNER: Yes.

WILEY: Seems fair to me.

MILLS: I don't know what the procedure is though, do I ask them now?

WILEY: Well, I will let him make his presentation, first, and then we will hear what he has to say.

PIRNER: And Russell, just by way of clarification, I think you had announced early that you are the attorney, representing the applicant. Do you have an ownership interest? Okay, so you are kind of an attorney and somewhat kind of the client?

MILLS: Somewhat, yes, very small percentage of the client.

PIRNER: I think that is important because, when Mr. Hughs, asks the questions, it is not just the lawyer that is responding.

HUGHS: Do I understand correctly, that your position is that a commercial composting operation fits within the definition of agricultural processing under the Zoning Code?

MILLS: I am not going to answer that question, because you just got through saying that he was going to give his presentation, and then I was going to be given the opportunity to question his client and then he could then question me.

MILLER: I think what he is saying is he can ask you the questions, then when they make their presentation, than you can ask them questions.

MILLS: Is that what you are saying?

WILEY: Yes, that is what I am saying.

MILLS: Sorry.

HUGHS: Is it your position that commercial composting operation fits within the

definition of agricultural processing under the code?

MILLS: It fits within the definition of agricultural use of the land, which is what we are trying to deal with here.

HUGHS: You have made reference to the definition of agricultural processing, is it your position that it does not fit within that definition or that it does fit within the definition?

MILLS: Well, it is my position. That is something they are going to have to determine not me.

HUGHS: Are you making any argument about that?

MILLS: What I am arguing is that this land is an agricultural use, it is being used for an agricultural use.

HUGHS: When the materials are brought to this facility are they materials that you pay for or are they materials that people pay to deposit at your facility?

MILLS: They are materials that people pay to deposit at our facility.

HUGHS: What percentage of the revenue from the operation comes from the receipts from depositing the materials verses the sale of the compost?

MILLS: I can't answer that question, I would say that the majority of the revenue comes from the receipts of collecting it, rather than processing it and selling it.

HUGHS: Through what outlets is the manufactured compost sold?

MILLS: Through us.

HUGHS: To whom?

MILLS: Anyone who wants to buy it.

HUGHS: Is most of it used offsite?

MILLS: So far the majority of it is being used on-site.

HUGHS: Is it used for landfill cover?

MILLS: Has been some, yes.

HUGHS: You said earlier that compost could only be used for agricultural activities,

is landfill cover in that group of what you think is agricultural activities.

MILLS: I also said soil amendment. We believe it to be a horticultural use.

HUGHS: In your April 26th letter to Mr. Wiltse, which is in the record, you indicated that the materials included but were not limited to grass, leaves, branches from trees, bushes, hay and straw, manure, and other organic materials. Are paper products included?

MILLS: Basically all those that I mentioned in the letter were really all that we have, all that we do use. I was afraid that if I forgot something like flowers for instance that might be put in there that I might have failed to mention that, that type of thing, we don't put like dead animals, or anything like that, newspaper or any type of waste like that doesn't go into the compost.

HUGHS: Can newspapers, and dead animals be composted at a composting facility?

MILLS: Well, it is possible, but they are not done at our facility.

HUGHS: But, we are talking generally though whether composting is an agricultural use. That is why I am asking in general about composting.

MILLS: What I am trying to tell you, is that composting as we use it on our property, as a land use issue nothing of composting does not deal with any of that.

HUGHS: Does the end product of composting, animal carcass or paper products differ from the end product of composting trees, flowers, bark and limbs and grass?

MILLS: Well, I can't tell you what the end product of composting dead animals or paper looks like because I have never done it. I don't know what it looks like. I would probably say yes, but I don't know.

HUGHS: How much waste is brought into Derby Recycling facility on any given day?

MILLS: It kind of depends upon the time of the year. If it is wintertime, you don't get a lot of grass, and you don't get a lot of hay or manure.

HUGHS: The average in the summer, what would your guess be, the amount of traffic that comes in?

MILLS: It would be just a guess. I really don't have any way of answering that question. John might, John Davis, might know better than. I do I don't know.

HUGHS: You submitted to Mr. Wiltse an application for a composting permit for

the facility from 1996 and that is in the record. There the application indicates that for estimated for number of loads daily-25 estimated, quantity 2 tons, cubic yards-17. Is that a fair estimate for the Board to use?

MILLS: If that is in the application, I would say that is a fair estimate because I would have gotten that from the employees.

HUGHS: What types of vehicles bring in these loads and material?

MILLS: Pick-ups, farm trucks, trucks from tree services that trim trees.

HUGHS: Are you familiar or aware of any occurrences of waste dropping out of the trucks on the way to the facility?

MILLS: Are you talking about the compost facility? Well, we don't take what we consider to be waste, we believe it is a product that is going to be turned into something that is useful.

HUGHS: Are you aware of any occurrences where tree limbs, or animal manure, or leaves or grass clippings have fallen out of the trucks on the way to the composting facility along the roadways?

MILLS: I suppose that is possible, I mean I am the attorney, I am not down there. I don't really know.

HUGHS: You are not aware of any occasions?

MILLS: Well, personally, I haven't seen it because I don't go down there that much. But, my assumption is that it probably has happened. I don't really know that for a fact, but that is my guess.

HUGHS: You have talked already about the fact that Derby Recycling uses a grinder, is that a hammer mill?

MILLS: Yes.

HUGHS: Is that with a tube grinder? Or does that have conveyor?

MILLS: No it is a flat grinder.

HUGHS: What other equipment does Derby Recycling use as part of the composting operation?

MILLS: A compost turner, a tractor to pull the compost turner, and a loader to load

the compost, and sometimes it used to drag material off of trucks.

HUGHS: Are you familiar with the composting process overall?

MILLS: Not really, I mean I know some of the process. I know the yard waste and wood waste, and leaves and things like that, and brush are ground and then they are placed in these long windrows. And then they are turned every so often to get the correct mixture of carbon and oxygen and things like that so that as it is turned it will eventually turn into kind of like a dirt like, I call it a dirt like looking substance and it is compost.

HUGHS: Are you familiar with potential complications from that process in terms of smells, that could be created or fire hazards if the material either gets too wet or too dry or mosquitoes and things?

MILLS: Well, if you don't handle compost or any material for that matter, properly, then yes, you can have problems. I can tell you this much, we haven't had any.

HUGHS: What are some of the problems you can have if you don't handle the materials correctly?

MILLS: You can have a smell, but that is true whether you are doing it at our location, or you are doing it out in the County on our farm location. It doesn't matter where you are doing the composting at. It is the same process no matter where you are.

HUGHS: Is spontaneous combustion another risk from improper composting?

MILLS: Yes, you can have a fire generate just like you can at the DeBruce Elevator. When the wheat wasn't properly taken care of. I mean the wheat dust wasn't taken care of properly. It wouldn't be anything near like that but you know you could have a fire.

HUGHS: Again, in terms of mosquitoes and rats are you familiar with that being a complication if compost is not handled correctly?

MILLS: Well I suppose that is a possibility, but we haven't had that problem.

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WILEY: Is there anything else now that you need to question?

HUGHS: Basically, I would like to take the opportunity to explain the position of Mr. Wiltse, as a Zoning Administrator on why the commercial facility, the compost, plant and animal waste that are shipped in from off-site isn't exempt from zoning

restrictions as an agricultural use of the land. Basically there are three points I want to make today. The first one is that the composting facility is not exempt as an agricultural use because composting is not the growing of crops or the raising of livestock. "Agricultural use" is not completely undefined. It is not a term that we simply say that if something might be in our general collective sense potentially agriculture needs to be construed in favor of the landowners. Instead we have some guidelines. We have guidelines from the Supreme Court, we have guidelines from Statutes, and we have guidelines in the Zoning Code to help us understand what is meant by an agricultural use and we will talk about those.

Secondly, the Legislature hasn't been silent on what composting is, on whether it is agricultural or something else. It has classified composting as solid waste processing.

Thirdly, the Zoning Code, as has already been indicated classifies the composting facility as a Recycling Processing Center. It is not simply silent on the questions as to what is composting.

Now, there has been an indication made that because the code doesn't use the word "composting", we ought to conclude that it is silent on what composting is. I would like to turn your attention to the Zoning Code, Section VI-H.4, and I will read it to you, this is talking about classification of unlisted uses. "For uses not specifically listed in this code or not obviously included in one of the comprehensive use definitions, the Zoning Administrator shall have the authority to determine the appropriate district or districts which allow the use based on the use's similarity to uses which are listed." So simply the absence of the word "composting" does not mean that it is an agricultural use, that is exempt from zoning.

Composting is not an agricultural use as I said because it is not the growing of crops or the raising of livestock. The Statute that we are concerned about that exempts agricultural uses is K.S.A. 12-759B. The Unified Zoning Code, Article 1, Section I-E, uses the same language and exempts from county zoning the use of land for agricultural purposes. An agricultural use requires either growing or raising something and compost is not grown or raised. Instead, it is created by the opposite process, by decay. Agricultural use requires growing or raising something. If we look at the Zoning Code, we see that agriculture means the use of any land for the purpose of growing plants, crops, trees, and other agriculture or forestry products or for the purpose of raising livestock. Only two verbs that can qualify as agriculture, "growing and raising".

K.S.A. 2-3203 – defines agricultural activity as the "growing or raising of horticultural and agricultural crops, hay, poultry, and livestock, poultry and dairy products for commercial purposes". Again those two functional verbs of "growing and raising". The Kansas cases from the Supreme Court that talk about whether we have an agricultural use also focus on this question of whether there is some live thing that is grown or raised. In the Miami County v. Svaboda cases, which Mr. Mills

talked about, the question there was, is a landing strip exempt as an agricultural use? The court said the first inquiry is to determine if we have some kind of agricultural activity. They found that there was turf grass that was being grown there that the airplane was used in order to further that agricultural operation of growing something and therefore we had an agriculture use. In *Corbet v. Board of Shawnee County Commissioners*, the animals being raised were hogs. In *Board of County Commissioners v Brown*, it was raising canaries. In *Fields v Anderson Cattle Company*, it was cattle. In the *Corbet* case that Mr. Mills was using we had both grains being raised in order to feed wild animals and we had wild animals for the hunting preserve. So, what we had was plants and animals being grown or raised and that really the functional definition of what is required before we can have an agricultural use.

But, compost is not grown or raised. If we look to the dictionary definition of “grow” we see “to spring up”, to come to mature, to have vegetable and animal life to exist as an living organism, concentrating on the fact that we are dealing with something living. Similarly, “to raise, to breed, to care for animals to maturity, practice cultivation of plants or crops.” Again, dealing with living things. But, compost is created by the opposite process of decay, and decomposition. In fact by regulator definition KDHE has defined compost in terms of the process of derogation. Composting means a control process of microbial derogation of organic materials into stable, nuisance free, like product.

If we look at what other courts and what other states have said, we find a case that Mr. Mills has referred to and in that case, there was composting activity occurring on the same site where the materials being composted were created. We don’t argue that that is not an exempt use. Just as a farmhouse that is used to facilitate a farming operation is exempt and a landing strip that is used to facilitate a turf farming operation is exempt, if you are talking about composting material created on site then you would have a non-agricultural, something that is not inherently agricultural but is being used to support the agricultural use of land and the courts have told us that that is exempt in the case that Mr. Mills cites within that rule.

But, if we look at other cases that deal with whether composting is an agricultural use we see the opposite conclusion. The first one is the 2000 case, recently is *Marik v. KB Compost Services* and I have provided each one of these cases in the record here, a copy of them, but let me talk about briefly what happened in these cases. In the first case KB Compost, operated a composting operation and a landfill on the property, the compost was created by mixing waste from municipal sewage plants, with wood chips and sawdust and all of the components were brought onto the property. So everything that was being composted was coming in from offsite, it was composted and then it was sold to others after the composting operation was done, much like what Derby Recycling is doing, and the argument that was made there was this was an agriculture use of the property and that therefore that it ought to be exempt. But what the magistrate court found there is that the, quoting from the opinion from the

Supreme Court, the magistrate found “compost created on the premises was not derived from materials that were produced on the property at issue but were instead brought onto the property by truck.” The magistrate also found, except for a very small portion retained for use on the property, the majority of the compost created was sold to another corporation associated with the appellants’, which resold the compost commercially to nurseries. Based on these facts, the magistrate determined that the composting operations were not an agricultural use. And the magistrates decision there was affirmed by the Ohio Court of Appeals. The court held that in the case at bar, the materials used to create the appellants’ compost were not produced on the property at issue, but were instead brought in from outside sources. The resultant compost was created almost entirely for sale to outside entities and not for farming operations on the property, as such this court concludes the appellants’ composting operations do not fit within the agricultural use exemption.

GRUENBACHER: Which case is this?

HUGHS: This is the Marik case v. KS Compost Services, Ohio Court of Appeals case. Next case I would like to call your attention is the Clout, Inc. v. Clinton County Zoning Hearing Board, this is a Pennsylvania case from 1994. The Clout case, again dealt with a composting operation. The materials there were also trucked in. They included leaves, yard waste, Christmas trees, brush, pallets, as well as food processing wastes, chicken manure, and canning industry waste. All of the materials again were brought in from off-site for composting on site. The court found that that was not an exempt use as an agricultural operation. The court held “under the broad interpretation espoused by the appellant, a sewage treatment plant selling sewage sludge to farmers would be a permitted use in an agricultural district as an activity related to the tilling of the soil. The manufactures of pesticides, herbicides and farm tractors are also engaged in activities broadly related to farming. But it would be anomalous to classify a factory of the Dupont Corporation engaged in the manufacture of a pesticide or a factory of International Harvester producing farm tractors as an agricultural rather than an industrial use under the terms of this ordinance.” What they are saying is you can’t simply look at whether the end product is used in horticulture or agriculture to determine whether the land use is an agricultural use. Instead, what we look at is something being grown or raised. Is there some plant or animal being grown or raised on the property to make it an agricultural use?

The third case that I have listed, Ticonderoga Farms, Inc., v. County of Loudoun, et al. This is a Virginia case from 1991. It involved a farming operation where initially the farm had composted materials that were generated onsite. But, later started bringing in from off-site brush, leaves, stumps, and other organic materials that were then collected and piled in windrows in order to decompose. The same manner that Mr. Mills, operation, operates. The court found that this was not an exempt operation.

The final cases I have cited is the Raymond J. Donovan v. Frezzo Brothers, Inc., this is a Third Circuit case from 1982. It involves a similar question. Under the federal fair labor standards acts, agricultural employees are exempt and a composting operator claimed that he was exempt from that act because this was really an agricultural operation to make, what was in that case, was mushroom compost. Essentially the same thing, bringing in biodegradable materials and composting them in windrows on-site. The court found that that was not "farming in all its branches" that it was not the cultivation or tillage of the soil that it did not constitute agriculture.

So, if we take the challenge that Mr. Mills, has presented and look at what other states do, we see that there is one state that has said that in certain circumstances composting can be exempt where you are composting farm materials created on a farm. We agree with that. But, the opinion of courts from other states is that when you are bringing in materials from offsite and composting those, that is not an agricultural use of the property. What the Donovan court ends up saying is "we think that mushroom compost is more appropriate described as a commodity produced by an industrial process or technique rather than as an agricultural commodity." Mushroom composting involves heating and moisture, to biologically, physically, and chemically, alter the ingredients to the changed product, compost.

So we begin by seeing that we don't have agriculture in the sense that it is defined in the Statutes, and in the sense that it is defined in the Zoning Code or in the sense that it is defined by the Courts. But, if we look at the Zoning Code, we see that what the Legislature has done. We see that the Legislature has classified compost as solid waste processing. K.S.A. 64-3402 provides that solid waste processing facility means among other things, a composting plant. Under the KDHE regulations a permit is required for composting and Mr. Mills has told you that indeed they have obtained a permit for composting at least on a portion of the land in which the composting is taking place. Finally, and this probably is decisive, the administrative regulations of the KDHE require that composting facilities shall conform to County and City Zoning regulations and ordinances. So, the KDHE had a choice of saying that either these are exempt as agricultural uses or that they are not exempt and what the regulation tells use is that a composting facility shall conform to zoning regulations and ordinances. Now, Derby Recycling has made a number of arguments, both in the oral argument today and in the written materials, which I would like to respond to directly.

The first one of those is what I would like to call the "Sawmill" argument. Looking at the definition of agricultural processing that includes potentially a sawmill, Mr. Mills has argued that, by analogy that composting ought to fit into this definition of agricultural processing. Well, the problem with that whole line of reasoning is that agricultural processing is not exempt from the Zoning Code. If this fits into the definition of agricultural processing as a sawmill, then the restrictions of the zoning code are even more erroneous than for the recycling facility that we think it actually should be classified as. Agricultural processing is permitted in "LI" and "GI" zoned districts. So merely even if you accept the analogy it is actually more detrimental to

Derby Recycling than it is helpful.

The second argument I would like to respond to is the argument essentially that it is used in horticulture therefore it is an agricultural use of property of the land. The use of the end product in horticulture doesn't make it a horticultural crop anymore than other products, nitrogen and hydro-ammonium, gasoline and tractors, that are used in agriculture are horticultural crops. Another argument that Mr. Mills makes is what I will call an "agricultural product" argument. That you have to classify the end product compost as an agriculture product because it can't be used anywhere else. Well, it can be used somewhere else, as a landfill cover, but, in any event whether it is an agricultural product is really irrelevant to the question of whether the land use where that product is created is an agricultural use. Tanned hides, canned vegetables, are agricultural products. But, tanneries and canneries are nonexempt as agricultural uses of land because you are not dealing with the growing of crops or the raising of animals.

We have another argument that we have heard that compost is stocked in every nursery in Wichita, is one of the arguments that is made in the written material. The argument is that because selling nursery stock on site is an accessory to an agricultural use it matters that compost is sold at nursery. I think the logic doesn't hold up. Shovels and concrete bird baths and decorative gravel are sold at nurseries in Wichita. They are not rendered plants and produce raised on the site, which the code provision at issue requires. The site of their manufacture, metal manufacturing plants, concrete casters and rock quarry aren't exempt from zoning laws merely because their products are sold at nurseries.

Finally we aren't simply dealing with an area that the code is silent about. Although, we have seen where Mr. Wiltse has the authority under the code to classify the use. But, instead this is a recycling processing center as defined by the Unified Zoning Code. Article II, Section II-B.11.e, defines recyclable material to mean material which is intended for reconstitution for the purpose of using the altered form. Is the manure, the leaves, or the grass clippings that come into Derby Recycling intended for reconstitution for the purpose of using the altered form for using the compost? Absolutely. That is exactly what they are intended for. The definition that lists some of the things that are included specifically says it is not an exhaustive list of those things, instead recyclable materials is anything which is intended for that use. So, clearly we are dealing with recyclable materials that come into the Derby Landfill. We see that a recycling processing center is defined to include land use in excess of 400 square feet devoted to storage, conversion and or processing of recyclable materials. Recyclable materials are they being converted or processed? Absolutely. They are being converted or processed into compost. So, it fits clearly within the definition of a recycling processing center.

Let's look at the big picture here because what you are being asked to do is not make a fact specific determination about whether composting ought to be allowed on a

specific piece of property. What you are being asked to do is to make a legal conclusion about whether composting in general as it has been described to Mr. Wiltse is always an agricultural use. Does it fit within the definition so that commercial composting operations can take place anywhere in the County without any restriction? The reason that we are here is because Derby Recycling wants to avoid difficulties that have arisen in the change of zoning process that it decided to follow initially. But, as I have said determining whether composting is an agricultural use has much broader ramifications. Now, Mr. Mills has argued that one of those ramifications is that Mr. Wiltse's decision would make composting by farmers illegal.

As I have indicated, that simply isn't true because as an accessory use to the growing of crops or the raising of animals it would be exempt. We see that the courts have exempted other uses which are not inherently agricultural when they further the agricultural use of the land. So, for instance in one case, that Mr. Mills has cited to you, "rock blasting" was exempted where the purpose of the rock blasting was to build a pond for crop irrigation. In another case the Supreme Court has exempted a farmhouse which was used to support a family farm. In a third case that I have already referred to, the Supreme Court exempted a landing strip used for a plane that was used to further turf farming operations. So, to say that we are going to put farmers in positions of violating the zoning code if composting is not agricultural use just isn't accurate.

Instead, the real big picture problem here is if Derby Recycling is right, if large scale commercial composting plants are exempt because the thing that they produce, compost, is a horticultural product. Then composting plants that recycle animal carcass, composting plants that recycle food stuffs still are producing a product that would be used in horticulture in under the reasoning presented by Mr. Mills would be exempt from all zoning restrictions. We think that is not what the Legislature intended when it exempted agricultural uses and when the definition of agricultural use focuses on the raising and growing of things not on the decomposition of things to create products that are used to farm.

So, essentially, the bases for Mr. Wiltse's decision is threefold. First of all as I stated initially, what we have here is something that doesn't fit within the growing or raising, which is an agricultural use. Secondly, the Legislature has told use this is solid waste processing, and thirdly the zoning code has a classification that tells us how to treat a composting plant. Even though the word compost is not found in the zoning code. Any questions?

WILEY: Okay, Mr. Mills, do you want to respond?

MILLS: I don't think I will be able to get done. I have to leave at five. I don't see how in the world I can get done in five minutes.

WILEY: Shall we defer the meeting until next week? Is there a good time Dale that

we should do that?

MILLER: Would a time next week work for everyone that needs to be here?

HUGHS: Depends when it is next week?

MILLER: What day is better for you?

HUGHS: I don't have my calendar with me, I am relatively certain that next Thursday would be good.

WILEY: Thursday is a bad day for you isn't Dale?

MILLER: The Sub-Division meeting, but I can work around that. If that works for everybody else.

PIRNER: I will make it work for me.

WILEY: Is there anybody else here that would like to speak on this case. Would that be a big imposition?

MILLS: No.

MILLER: So we are talking about July 20th.

WILEY: Mr. Mills you said you couldn't get done this evening how much time do you think you are going to need to finish? Is 3:30 p.m. sufficient to begin the meeting?

MILLS: Yes.

MILLER: What we will have to do is nail down what room will be available. We may be able to be back in here, maybe in the County Commission room where we ordinarily meet. We will shoot for 3:30 p.m.

HUGHS: We do still have five minutes now if there are any questions while it is fresh in anybody's mind. I would be glad to discuss those.

WILEY: I don't think the Board here had any questions.

MILLER: Thank you very much and sorry for the confusion of getting started.

WILEY: Dale, will you send us a letter.

MILLER: Yes, and we will call you as to what we will do.

MILLS: May I have a complete copy of anything Mr. Hughs has presented?

VANDEWATER: Yes. If you would like to stop by the office tomorrow we will get you a complete copy.

MEETING ADJOURNED AT 5:00 p.m.